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# In The
# Supreme Court of The United States

ALLIED SYSTEMS, LTD.,
*Petitioner,*

v.

TEAMSTERS NATIONAL AUTOMOBILE TRANSPORTERS INDUSTRY NEGOTIATION COMMITTEE, LOCAL UNION 327, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, DAVID HODGIN AND JIMMY NEAL, ITS OFFICERS, AGENTS AND EMPLOYEES AND ITS MEMBERS WHO ARE EMPLOYED BY PLAINTIFF, ALLIED SYSTEMS, LTD. AT ITS NASHVILLE, TENNESSEE FACILITIES.
*Respondents.*

## Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Is an employer seeking to enjoin a work stoppage pursuant to the criteria established by this Court in Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970) required to establish that the dispute underlying the controversy is clearly and undisputably arbitrable under the terms of the collective bargaining agreement as a condition precedent to obtaining injunctive relief?

Is an employer seeking to enjoin a work stoppage pursuant to the criteria established by this Court in Boys Markets, supra, entitled to a presumption of arbitrability as initially defined by this Court in its United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) and thereafter approved in Gateway Coal Company v. United Mineworkers, 414 U.S. 368 (1974) and AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643 (1986) when establishing that the dispute underlying the controversy is subject to binding arbitration under the terms of the collective bargaining agreement?

Was it this Court's intention to create two distinct standards by which an employer must establish whether a controversy arising under a labor agreement is subject to binding arbitration: one, a presumption of arbitrability to determine

whether an arbitration clause should be specifically enforced; and two, clear and undisputable evidence that the controversy underlying a work stoppage is subject to binding arbitration when seeking a Boys Markets injunction, which, if not, underscores the conflict between the standards applied by the Third and Fifth Circuits as opposed to the standards created and applied by the Second and Sixth Circuits?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are Allied Systems, Ltd., the Petitioner, and Teamsters National Automobile Transporters Negotiating Committee, Local Union 327, an affiliate of the International Brotherhood of Teamsters; David Hodgin and Jimmy Neal, officers of Local Union 327, as well as other officers, agents and employees of Local 327 and its members employed by Allied at its Nashville, Tennessee facility, the Respondents.

The Petitioner, Allied Systems, Ltd. is a wholly owned subsidiary of Allied Automotive Group, Inc. Allied Automotive Group, Inc. is a wholly owned subsidiary of Allied Holdings, Inc.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Allied Systems, Ltd., respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit was filed on June 9, 1999 and was recommended for full text publication pursuant to Sixth Circuit Rule 206. (Appendix A). The trial court's unpublished order denying Plaintiff's Motion for Preliminary Injunction was filed on June 11, 1998. (Appendix B). The trial court's transcript of the bench ruling of Judge Todd J. Campbell on Plaintiff's Motion for Preliminary Injunction was filed on June 12, 1998. (Appendix C).

## JURISDICTIONAL STATEMENT

Petitioner, Allied Systems, Ltd., seeks review of the June 9, 1999 Order of the United States Court of Appeals for the Sixth Circuit. This Order affirmed the District Court's June 11, 1998 denial of Petitioner's request for injunctive relief brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, and this Court's decision in Boys Markets, supra.

The complaint was brought to enjoin a work stoppage involving a labor agreement containing a no-strike clause provision, a mandatory grievance and arbitration procedure and a broad arbitration clause. The Court of Appeals has decided an important issue of federal labor law by requiring that the Petitioner establish that the controversy over which the work stoppage occurred was clearly and undisputably subject to binding arbitration, and, therefore, arbitrable under the arbitration clause. The standard utilized by the Sixth Circuit is in conflict with other Courts of Appeal decisions, notably those of the Third and Fifth Circuits involving this same important issue of federal labor law in which these courts adopted a presumption of arbitrability as the appropriate test. This conflict has not been, but should be reviewed and settled by this Court.

Moreover, the Court of Appeals for the Sixth Circuit June 9, 1999 decision requiring the Petitioner to establish clearly and undisputably that the controversy over which the work stoppage was subject to binding arbitration is contrary to the presumption of arbitrability consistently enunciated by this Court as applicable in similar circumstances. United Steelworkers of America v. Warrior & Gulf Navigation, 363 U.S. 574 (1960); Gateway Coal Company v. United Mine Workers, 414 U.S. 368 (1974); and AT&T Technologies, Inc. v. Communication Workers, 475 U.S. 643 (1986).

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. 1254 (1). (Appendix D)

## STATUTORY PROVISIONS

The present case involves the interpretation of the relationship of the Labor Management Relations Act, Section 301, 29 U.S.C. 185 as it relates to the Norris-LaGuardia Anti-Injunction Act, 29 U.S.C. 101, et seq. The full text of both of these statutory provisions are set forth in the Appendix (Appendices E - P).

## STATEMENT OF THE CASE

### A. The Parties to this Appeal

Petitioner, Allied Systems, Ltd.'s ("Allied" or "Petitioner") principal office is located in Decatur, Georgia. It operates over one hundred (100) terminal facilities throughout the continental United States including one (1) in Nashville, Tennessee.

Respondent Teamsters National Automobile Transporters Industry Negotiating Committee ("TNATINC") is a labor organization affiliated with the International Brotherhood of Teamsters ("IBT"). It is authorized by numerous local unions affiliated with the IBT, including Respondent Local Union 327 ("Local 327"), to negotiate on their behalf the terms and conditions of an industry-wide agreement entitled the, "National Master Automobile Transporters Agreement" ("National Agreement") and its various Supplements. Local 327 is a labor organization

affiliated with the IBT. It represents the employees of Allied domiciled at its Nashville location. Respondents David Hodgin and Jimmy Neal are Local 327's President and Business Agent, respectively.

**B. Relevant Provisions of the National Agreement**

The National Agreement contains a no-strike clause and a comprehensive grievance and arbitration procedure to which disputes arising under the contract are to be submitted.

More specifically, Article 7, Section 1 of the National Agreement provides that all grievances and questions of interpretation arising from the Agreement shall be submitted to the grievance procedure for determination. They agree that there shall be no strike on the part of the employees or that the Employer use a lockout without first using all possible means of a settlement, provided for in the Agreement of any controversy which might arise.

Disputes that are not settled shall be referred to the appropriate Joint Committee, except for certain undisputable direct violations, including *inter alia* that specified in Article 7, Section 1(a) the nonpayment of the established wage rates, when due, provided for in the Agreement, Supplements or Rider. The parties further agree that this exception does not apply to disputes over the computation of wages or the application of wage rates.

The Local Union is to give a seventy-two (72) hour written notice prior to taking any strike action authorized by

this Section and is to specify the reason or reasons for the strike.

Article 7, Section 7(a) provides *inter alia* that it was the function of the National Committee to settle all disputes involving the interpretations of, or disputes over, the provisions of the National Agreement as well as disputes and interpretations concerning alleged conflicts in provisions of the National Agreement on the one hand and Area Supplements and Riders on the other hand.

Article 7, Section 8 provides that all matters pertaining to the interpretation of any provision of this National Agreement must be submitted to the National Committee for decision.

Article 7, Sections 8(a) and (e) provide that decisions of the majority of any Joint Committee shall be final and binding on the Employer, Local Union and the employees affected.

Article 7, Section 13 of the National Agreement establishes the scope of the grievance procedure and states as follows:

> "Unless otherwise expressly provided in this Agreement, any and all disputes, including interpretations of contract provisions arising under, out of, in connection with, or in relation to this collective bargaining agreement, shall be subject to the grievance

procedure of this Agreement."

**C. Summary of Relevant Facts**

On or about October 1, 1997, Allied Holdings, Inc. ("Holdings") purchased Ryder Automobile Carrier Group ("RACG") and its subsidiary corporations including Commercial Carriers, Inc. ("CCI"). Following the acquisition, the seventy-nine (79) terminals of RACG's subsidiaries were assumed by Allied Automotive Group Inc. ("AAG"), Allied's parent organization, a wholly owned subsidiary of Holdings. RACG's seventy-nine (79) terminals were added to the twenty-six (26) terminals previously operated by Allied.

As a result of this acquisition, Allied was confronted with operating dual terminals at seventeen (17) locations throughout the United States in which both Allied and one of the RACG operating subsidiaries, including CCI, operated terminals in the same general location.

As a matter of due diligence, both before, during and after the acquisition, Allied management explored means to consolidate some, if not all, of these commonly operated locations including Nashville, Tennessee.

Beginning in November 1997 Allied announced its intent to merge terminals at some or all of the locations at which it did operate two (2) or more facilities.

During the course of its due diligence, Allied management concluded that prior industry arbitration

decisions established that when two (2) terminals were merged, the conditions that applied at the terminal into which the operations were physically merged were the conditions that continued and applied at the surviving terminal. These conditions included local pay rates, dispatch procedures, payroll periods and other contrasting conditions unique to the terminals in question. The prior arbitration decisions supporting this position were accumulated and disseminated to the various Teamster local unions when merger announcements were made.

In December 1997, Allied announced to Jimmy Neal, Business Representative of Local 327, that it intended to merge the two (2) Nashville, Tennessee facilities and stated that the merger would take place in early 1998.

In February 1998, Allied and Local 327 submitted to the National Joint Standing Seniority Committee ("NJSSC"), an arbitration panel authorized to resolve only seniority disputes arising under Article 5, Sections 4, 5, 7 or 8 of the National Agreement, a request to determine the manner in which the seniority issues triggered by the merger should be resolved. This request was docketed with the NJSSC as Case No. 2-98-171. The NJSSC issued a decision in which it determined that Article 5, Section 4(a) of the contract applied and, therefore, the two (2) terminal seniority lists would be merged in accordance with the employee's respective terminal seniority dates. Allied requested a resolution of the

issue of which of the two (2) terminal's conditions would apply after the merger, but the NJSSC concluded that given its limited jurisdiction, it could not resolve that question.

Thereafter, Allied discussed the pending merger on a number of occasions with Local 327. Each time it reiterated that Allied intended to apply the conditions of the 743 Harding Place terminal after the merger was consummated. These discussions occurred in January, February, March and April, 1998 in advance of the merger. Local 327 did not protest this application on any of these occasions. The merger of Allied's Nashville terminals was delayed for administrative reasons.

Meanwhile, Allied merged its terminals at Memphis, Tennessee; Selkirk, NY; Kansas City, Kansas; Dallas, Texas; Houston, Texas; Tampa, Florida and Jacksonville, Florida, each of which was covered by the National Agreement. When merging, Allied applied the local conditions which prevailed at the successor terminal into which the employees were being merged.

Grievances were filed at Selkirk, New York; Memphis, Tennessee; Tampa, Florida and were filed at Jacksonville, Florida and Houston, Texas after the merger. In each instance, the local union protested Petitioner's policy of applying the local conditions which were previously in existence at the successor terminal into which the merger was consummated.

Allied's two (2) Nashville terminals were merged May 10, 1998. After the merger, the Veritas Street and Harding Place terminal seniority lists were dovetailed and a single Harding Place list was published; the equipment from both terminals was consolidated and reassigned to the Harding Place terminal; the Harding Place payroll period was utilized; terminal operations including terminal administrative staff and the maintenance facility, were placed at the Harding Place terminal; all traffic available both at Harding Place and Veritas Street was dispatched at the Harding Place terminal to the drivers on the merged terminal seniority list; and the Harding Place local pay rates were used exclusively when compensating the drivers, where applicable.

Prior to the merger, Allied continued to pay the Veritas Street local rates consistent with CCI's prior obligations. After the merger, Allied commenced to pay the Harding Place rates exclusively to the combined group of employees. These rates provided a comprehensive pay schedule so that all trips assigned all employees after the merger could be paid in accordance with the Harding Place rates. There were no gaps in the application that would otherwise prohibit this policy.

The Harding Place local pay rates are admittedly dissimilar to those of the Veritas terminal. Drivers compensated pursuant to Harding Place local rates were paid at higher rates in some instances and at lower rates in others.

The net effect, while not clearly identified, suggests that more often than not, the Harding Place rate would compensate the former Veritas Street employees at a higher rate than they would have experienced at the former location.

On May 20, 1998, Allied was advised that Local 327 had been authorized by TNATINC to engage in a work stoppage at Nashville, Tennessee to protest the exclusive payment of the Harding Place rates. In response, it submitted a letter to TNATINC on May 22, 1998 protesting the threatened work stoppage, contending that any strike over application of the Harding Place rates would violate the no-strike clause in the National Agreement and that it was prepared to arbitrate this dispute pursuant to the grievance procedure contained in Article 7 of the National Agreement.

Nonetheless, on May 29, 1998, Local 327 issued Allied a written seventy-two (72) hour strike notice. This written notice asserted that the Company was violating Article 1, Section 3 which provided in part as follows:

> "The Employer's obligations under this Agreement, * * * shall be binding upon its successors, administrators, executors and assigns. * * * ".

Moreover, Local 327 cited the Article 7, Section 1(a) exception to the no-strike clause.

In response to this strike notice, Allied protested contending the threatened work stoppage violated the no-

strike provisions of Article 7, Section 1. Allied asserted that the exclusive application of Harding Place pay rates was a controversy subject to resolution by the parties' grievance procedure. It also requested that the IBT and TNATINC take immediate action to prevent the threatened work stoppage, or if one occurred, to take action to terminate it.

On June 4, 1998, a work stoppage did ensue at Allied's Nashville Harding Place terminal. Local 327 contended that the dispute leading to the strike was Allied's application of the Harding Place local pay rates to all employees for all work, including vehicles located at the Veritas Street terminal.

Allied filed a Complaint seeking injunctive relief. At a June 4, 1998 hearing the Honorable Todd Campbell, U.S. District Court Judge, Middle District of Tennessee, issued a Temporary Restraining Order, including an Order to Show Cause why a preliminary injunction should not be issued.

On June 11, 1998, the District Court denied Allied's Motion for Preliminary Injunction for reasons set forth in the Memorandum of Opinion (Appendix C), and, thereafter, issued an Order denying Allied's Motion for Preliminary Injunction on June 12, 1998 (Appendix B).

A Notice of Appeal from this Order was filed by Allied on Friday, June 19, 1998 with the United States Court of Appeals for the Sixth Circuit.

On June 9, 1999, the Sixth Circuit issued an Opinion

affirming the lower court's denial of Allied's Motion for Preliminary Injunction. (Appendix A)

## REASONS FOR GRANTING THE WRIT

### I. The Petition should be granted because the Sixth Circuit Opinion below conflicts with other Circuit's rulings concerning the standard by which a party seeking a Boys Markets injunction must establish the arbitrability of the controversy over which the work stoppage has ensued.

The Court of Appeals for the Sixth Circuit affirmed the lower court's denial of Petitioner's request for a preliminary injunction brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 and this Court's Boys Markets decision. It found that to support a request for injunctive relief the Petitioner must establish by clear and undisputable evidence that the controversy over which the work stoppage occurred was arbitrable under the collective bargaining agreement. This application is in conflict with other Circuits including the Third and Fifth Circuit, which have applied the presumption of arbitrability when determining whether a controversy over which the work stoppage occurred was subject to arbitration to satisfy the relevant Boys Markets criterion.

The Sixth Circuit in the instant case, as it did in Waller Brothers Stone Company v. United Steelworkers, 620

F. 2d 132 (6th Cir. 1980), found that it was incumbent upon the employer to establish that the controversy over which the work stoppage for which the Boys Markets injunction was sought was "clearly and undisputably" subject to binding arbitration under the terms of the parties' agreement and thus in violation of the no-strike clause. The Sixth Circuit relied, in part, upon the Court of Appeals for the Second Circuit decision in Standard Food Products Corporation v. Brandenberg, 436 F. 2d 964 (2nd Cir. 1970) in which the Second Circuit found that in the event the union submits a "colorable claim" that the alleged violation of the contract is not arbitrable, a Boys Markets injunction may not be issued.

Before reaching its decision in the instant matter, the Sixth Circuit identified the issue to be resolved as whether the dispute underlying the controversy over which the work stoppage occurred was subject to binding arbitration under the terms of the parties' collective bargaining agreement (Appendix A at Apx. 13-14). It recognized that the Petitioner was correct in contending that congressional policy has long favored the arbitration of labor disputes (Appendix A, Apx. 15). Moreover, the Sixth Circuit identified the underlying dispute in the instant matter as "whether Allied's decision to use the Harding facility wage rates constituted nonpayment of the Veritas rate or was an exercise in the application of wage rates" (Appendix A at Apx. 17).

The Sixth Circuit found that:

> "* * * reasonable minds may differ as to whether Allied's decision to use the Harding facility wage rates constituted (as the union asserts) the nonpayment of the Veritas facility established wage rates or (as Allied asserts) the application of wage rates. Both the union's and Allied's interpretation of the National Agreement have merit." (Appendix A at Apx. 19).

The Sixth Circuit found that there was an ambiguity in the collective bargaining agreement involved in the instant matter because it provided both that the no-strike clause did not apply to nonpayment of established wage rates, but concurrently provided that the no-strike clause applied to a dispute over the application or computation of wage rates. Given this ambiguity, it found that it was divested of authority to issue a Boys Markets injunction given the Norris-LaGuardia Act's anti-injunction provisions.

Consistent with its finding in Waller Brothers Stone Company, supra, the Sixth Circuit held that Petitioner had not demonstrated that its interpretation of the National Agreement was so "clearly and undisputably" correct to warrant issuance of the Boys Markets injunction.

The standard enunciated by the Sixth Circuit clearly conflicts with the standard utilized by the Courts of Appeals for the Third and Fifth Circuits in Avco Corporation v.

International Union, United Auto Workers, 459 F. 2d 968 (3rd Cir. 1972), and in Southwestern Bell Telephone Company v. Communication Workers of America, 454 F. 2d 1333 (5th Cir. 1971), *per curiam* (5th Cir. 1972) (modified on denial of rehearing and rehearing en banc), respectively.

In Avco Corporation, supra, the Third Circuit found that the presumption of arbitrability, initially enunciated by this Court in United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), was applicable in the context of a Boys Markets injunction request when determining whether the issue over which the work stoppage to be enjoined was arbitrable under the parties' agreement. This is demonstrated by the Third Circuit's statement in Avco Corporation, supra, citing Warrior & Gulf Navigation, supra,:

> "In the absence of any express provision excluding the particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail particularly where * * * the arbitration clause [is] quite broad. 363 U.S. at 584 - 585. (459 F.2d. 968 at 973)

A similar criteria was used by the Fifth Circuit in Southwestern Bell v. C.W.A., supra, in which it found that whether it confronted a request to specifically enforce an arbitration clause or a request for a Boys Markets injunction, the same arbitrability test applies. In both situations it

confines its examination to finding whether the party seeking arbitration is making a claim which was "arguably arbitrable" on its face. (454 F.2d. 1333 at 1336) If so, the Fifth Circuit would order the parties to arbitrate the issue in question or issue a Boys Markets injunction pending arbitration of the issue.

Petitioner contends that the Third and Fifth Circuits would have sustained Petitioner's request for the issuance of a Boys Markets injunction and ordered the parties to arbitrate the Harding Place wage dispute over which the work stoppage occurred. This is because it could not be said with positive assurance that the broad arbitration clause of the National Agreement was not susceptible of an interpretation that covered the asserted Harding Place wage dispute. Any doubts would be resolved in favor of coverage by the Third and Fifth Circuits.

The conflict between the standards created and applied by the Second and Sixth Circuits and the standard applied by the Third and Fifth Circuits is irreconcilable without this Court's intervention.[1] Therefore, grant of certiorari in this

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1 An ALR Federal annotation published in 1984 (66 ALR Fed. 11, et seq) set forth a comprehensive examination of the judicial developments relating to the exceptions to the anti-injunction labor law apparently triggered by the then recent issuance of the Sixth Circuit's Waller Brothers Stone Company decision supra, (66 ALR Fed. 1-10) which precedes

matter is fully justified.

## II. The Petition should be granted because the Sixth Circuit opinion below conflicts with this Court's prior rulings establishing that a presumption of arbitrability applies when determining whether an issue over which a labor controversy has occurred is arbitrable once a labor agreement containing arbitration and no-strike clauses is established.

Petitioner further contends that its Petition for Certiorari should be granted because the Sixth Circuit's decision in this case is contrary to this Court's decisions in the Steelworkers Trilogy.[2] Gateway Coal Co. v. United Mineworkers, 414 U.S. 368 (1974), and AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643 (1986).

In each of these decisions, this Court established that a presumption of arbitrability applies in actions brought

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the annotation. The conflict among the Circuits concerning the application of and propriety of a presumption of arbitrability in a Boys Markets setting is discussed. 66 ALR Fed. 36-38

2 Warrior & Gulf Navigation, supra; United Steelworkers of America v. Enterprise Wheel Car Corporation, 363 U.S. 593 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, when determining whether an issue is arbitrable in the context of a controversy arising under a labor agreement. These decisions collectively and individually establish that a lower court confronting a request either to issue a Boys Markets injunction or to enforce an arbitration clause is to presume the controversy over which either request is made is arbitrable in the absence of explicit and forceful evidence to the contrary.

Commencing with the Steelworkers Trilogy, specifically in Warrior & Gulf Navigation, supra, this Court admonished the lower courts that once a labor agreement containing a broad arbitration clause providing for submission of disputes to arbitration is established, a presumption of arbitrability applies. This Court stated in Warrior & Gulf Navigation, supra,

> "* * * To be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive

> assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. 574 at 582-583.

Subsequent to the Steelworkers Trilogy, this Court again supported the congressional policy favoring the peaceful resolution of labor contract disputes by arbitration when deciding Boys Markets, supra, and, thereby established an exception to the Norris LaGuardia Anti-Injunction Act. Petitioner acknowledges Boys Markets injunctive relief can only be granted *inter alia*, when the controversy over which the work stoppage sought to be enjoined involves a labor dispute as defined by the Norris LaGuardia Act and that the controversy leading to the work stoppage is subject to binding arbitration under the terms of the collective bargaining agreement. Moreover, Petitioner is fully cognizant that the Boys Markets decision was a "narrow" one and limited to the precise circumstances outlined in that decision. Yet, in the instant case, the Sixth Circuit acknowledges the only disputed issue concerning whether a Boys Markets injunction is justified is whether the controversy leading to the work stoppage is arbitrable. Thus, Petitioner is entitled to a presumption of arbitrability, consistent with this Court's Warrior & Gulf Navigation, Gateway Coal, and AT&T Technologies decisions. Otherwise, the policy considerations

underlying Boys Markets are substantially emasculated.

If Petitioner is entitled to a presumption of arbitrability in the instant case, the Sixth Circuit erred by imposing upon it a contradictory burden to concurrently establish that the issue presumed to be arbitrable is also "clearly and undisputably" subject to binding arbitration pursuant to the parties' agreement. This commingling of a presumption of arbitrability with an obligation to establish that the same issue is clearly and undisputably subject to arbitration is hopelessly at odds. It can only be corrected by this Court.

Whether the presumption of arbitrability was applicable to a trial court's analysis of a Boys Markets injunction request was an issue acknowledged by many shortly after the issuance of the Boys Markets decision. In a 1971 Harvard Law Review article, it was noted that Boys Markets did not settle the question of whether the presumption of arbitrability should be applied by courts when determining whether a grievance is "arbitrable" for the purpose of issuing a Boys Markets injunction. (85 Harv. L. Rev. 636 at 639). While the commentators recognized that it was arguable that stricter scrutiny of arbitrability might be appropriate, they criticized the Second Circuit's "colorable claim" standard enunciated in Standard Food Products Co., supra, in which the Court had rejected a presumption of arbitrability as a relevant standard in issuing Boys Markets

injunctions. The commentary noted that if courts were to apply the 'colorable claim' theory to interpretation of exclusions from the arbitration clause, it would be tantamount to establishing a presumption of non-arbitrability. The commentators opined that the burden to overcome a union's "colorable claim" was, therefore, excessive in light of the strong congressional policy favoring the use of arbitration to promote industrial peace. (85 Harv. L. Rev. at 643) In the instant case, the Sixth Circuit has in effect likewise created a presumption of non-arbitrability which an employer must overcome to obtain a Boys Markets injunction.

In 1974 and 1986, this Court issued its Gateway Coal, supra, and AT&T Technologies, supra, decisions respectively. Petitioner believes that in both, this Court reiterated that a presumption of arbitrability is the appropriate test in determining whether a labor dispute is arbitrable in the context of either a Boys Markets injunction request, as in Gateway Coal, supra, or a determination of substantive arbitrability, as in AT&T Technologies, supra.

In Gateway Coal, supra, this Court found that arbitration was equally applicable to labor disputes touching the safety of employees as to other varieties of disagreements. Particularly relevant to the instant case it found that the presumption of arbitrability enunciated in Warrior & Gulf, supra, applied to safety disputes and that the dispute involved was covered by the arbitration clause in the parties' collective

bargaining agreement. It found, moreover that absent an explicit expression of the parties' intention not to apply the broad mandatory arbitration clause, the agreement to arbitrate and the duty not to strike were to be construed as having coterminous application. (414 U.S. 368 at 382).

Petitioner contends that in Gateway Coal, this Court established that a presumption of arbitrability is the test to be utilized by a trial court when determining the arbitrability of a controversy leading to a work stoppage in the context of a request for injunctive relief pursuant to the Boys Markets criteria. Thus, the Sixth Circuit's imposition of a conflicting standard by which Petitioner had to establish by clear and undisputable evidence that the controversy over which the work stoppage sought to be enjoined was subject to binding arbitration is inconsistent with this Court's Gateway Coal decision.

Furthermore, the Petitioner further contends that the presumption of arbitrability was further extended by this Court when it issued its decision in AT&T Technologies, Inc., supra. Therein, this Court found that a question of whether a collective bargaining agreement creates a duty to arbitrate is an issue for determination first by the court and not by the arbitrator unless the parties clearly and unmistakably provide to the contrary. But in doing do, the Court reiterated that a presumption of arbitrability is applicable to determining the question of arbitrability. Citing Warrior & Gulf, supra, it

reiterated that an order to arbitrate should not be denied unless the lower court finds with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute and that any doubts should be resolved in favor of arbitrability. (475 U.S. 643 at 650). Moreover, it cited Gateway Coal as further support of the presumption of arbitrability as the test for determining arbitrability. In remanding the issue to the district court it concluded:

> "The issue in the case is whether, because of expressed exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause. * * *"
> (475 U.S. 643 at 652).

Effectively ignoring the above authorities, and their consistent and uniform affirmation of the presumption of arbitrability, the Sixth Circuit sought to rely upon this Court's decision in Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397 (1976). This reliance is misplaced. In Buffalo Forge Co., supra, this Court was confronted with the Second Circuit's affirmance of the district court's denial of the employer's request for a preliminary injunction sought pursuant to the Boys Markets criteria. The employer's office and technical employees had struck and picketed in the midst of a contract dispute. The same employer's production and maintenance employees, who were encompassed by a

separate labor agreement, honored the office and technical workers picket line in sympathy pursuant to their union's request. The employer sought to enjoin the union from authorizing and directing the production and maintenance employees to honor the other employee's picket line. The employer's labor agreement with the production and maintenance employees contained a no-strike and broad arbitration clauses.

This Court found its Boys Markets decision plainly did not control in the Buffalo Forge circumstances. It found the sympathy strike was an issue not remotely subject to the arbitration provisions of the parties' labor contract. It found that neither the office workers strike or causes nor the issues underlying their strike were subject to the settlement procedures of the contract between the employer and its production and maintenance employees. (428 U.S. 397 at 407, 408) This Court further found that the alleged violation of the no-strike clause did not in itself warrant an injunction given the anti-injunction restrictions in the Norris LaGuardia Act (428 U.S. 397 at 409).

It is clear in the instant matter, however, that the work stoppage was not a sympathy strike but was caused by a dispute over which of the two established wage rates were to be paid at the Harding Place terminal. It involves only the parties to the collective bargaining agreement directly involved in the injunction proceeding. An arbitrator could

have resolved the wage dispute which is the kind of dispute contemplated by the parties' broad arbitration clause. The wage dispute, was and is directly subject to the arbitration provisions of the agreement, and is therefore, clearly distinguishable from the facts inherent in Buffalo Forge.

Moreover, the Petitioner did not seek an injunction pending arbitration of an alleged violation of the no-strike clause. Rather, the Petitioner sought to enjoin the strike pending arbitration of the controversy leading to the work stoppage: whether it was entitled to pay the Harding Place rate after the merger of the two Nashville terminals. In the instant case, the violation of the no-strike clause was not the issue to be arbitrated, which was a major premise of this Court's Buffalo Forge decision. Therefore, Buffalo Forge, supra, is manifestly distinguishable and should not be viewed as controlling authority in determining the matter at issue.

Moreover, the Sixth Circuit's reliance on Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association, 457 U.S. 702 (1982) to support its "clear and undisputed" standard is equally misplaced. In Jacksonville Bulk Terminals, Inc., supra, this Court confronted the Fifth Circuit's reversal of the district court's issuance of an order enjoining a work stoppage alleged to violate a no-strike clause. Following President Carter's decision to restrict trade with the Soviet Union due to its intervention in Afghanistan, the International Longshoremen's Association ("ILA"),

announced that its members would not handle cargo inbound or outbound to the Soviet Union or carried on its ships. In response, members of an ILA affiliate refused to load chemicals, not included in the President's embargo, bound for the Soviet Union. The shipping terminal operator, the manufacturers of the chemicals, and the parent corporation of both filed an action pursuant to Section 301 of the LMRA, 29 U.S.C. 185, seeking to enjoin the work stoppage which they alleged violated the labor agreement between the terminal operator and the ILA affiliate.

This Court initially found that the work stoppage protesting the Soviet Union related shipments, even though politically motivated, was nonetheless a labor dispute within the meaning of the Norris LaGuardia Anti-Injunction Act. In addition, it found that its Buffalo Forge decision was applicable and, therefore, sustained the Fifth Circuit's vacating the labor injunction. In doing so, it found that the labor dispute involved in Jacksonville Bulk Terminals, like the sympathy strike dispute in Buffalo Forge, was not remotely related to the arbitration clause in the parties' labor agreement. It found that the underlying dispute, whether viewed as an expression of the Union's 'moral outrage' at Soviet military policy or as an expression of sympathy for the people of Afghanistan was plainly not arbitrable under the collective bargaining agreement. (457 U.S. 702 at 721). Since the controversy over which the work stoppage was

"plainly not arbitrable" it could not be enjoined, a finding consistent with the narrow parameters of the Boys Markets criteria and, thus, it fell within the limitations of the Norris LaGuardia Act.

The Sixth Circuit's adoption of the Jacksonville Bulk Terminals "plainly not arbitrable" language to support its finding that the Petitioner was obligated to establish that the controversy leading to the work stoppage was "clearly and undisputably" subject to binding arbitration is a non sequitur. Simply put, to find an issue is 'plainly not arbitrable' is the opposite from an obligation to find that the same issue is "clearly and undisputably arbitrable". For this reason, the Sixth Circuit's reliance upon Jacksonville Bulk Terminals is without foundation.

Petitioner therefore suggests that this Court's affirmation of the presumption of arbitrability in Gateway Coal and AT&T Technologies clearly prevails in the instant matter. Thus, it prays that the Court grant certiorari to further affirm its role in the resolution of arbitrability disputes in Boys Markets applications.

## CONCLUSION

In the twenty-nine years since this Court decided Boys Markets, the lower courts have differed in determining the tests by which the party seeking an injunction must establish the arbitrability of the controversy over which the work stoppage has occurred. As a result, a conflict has developed

among the Courts of Appeals which cannot help but frustrate parties in seeking injunctive relief under the criteria set forth in Boys Markets, supra. The instant case illustrates this conflict because the Sixth Circuit has found that a party seeking injunctive relief pursuant to Boys Markets must establish by clear and undisputed evidence that the controversy over which the work stoppage sought to be enjoined is subject to binding arbitration. While this test is comparable to the Second Circuit's "colorable claim" standard, it conflicts with the Third and Fifth Circuits' adoption of a presumption of arbitrability, consistent with this Court's earlier decisions in Warrior & Gulf, Gateway Coal and AT&T Technologies. This conflict has produced confusion among the parties seeking to comply with this Court's Boys Markets criteria and has led to different results depending on the Circuit in which the action is brought. Adherence to the policy considerations inherent in Boys Markets should not vary because of the residence of the parties seeking relief.

Moreover, the Sixth Circuit's failure in the instant case to acknowledge the presumption of arbitrability so carefully enunciated by this Court in its Steel Trilogy, Gateway Coal and AT&T Technologies decisions, effectively emasculates the principles and policies leading to the Boys Markets decision as well as the congressional policy favoring arbitration upon which that decision was well founded.

Whether the Sixth Circuit decision is viewed as in conflict with the aforementioned decisions or as evidence of an element of significant federal labor law which is not yet resolved, it is an issue which requires resolution by this Court at this time.

Petitioner Allied prays that certiorari be granted to permit this Court to resolve the manifest conflict within the Circuits and to establish that a presumption of arbitrability is the appropriate test to determine the requisite arbitrability of the controversy leading to the work stoppage when seeking injunctive relief pursuant to Boys Markets, supra .

Respectfully submitted:

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